BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion and Order of the Courts below.

Opinion of Board of Tax Appeals, R. 63.

Findings of Fact of B. T. A., R. 58, reported 42 B. T. A. 225.

> [The findings of fact and opinion of the Board commenced at R. 58, line 21; paragraphs numbered 1, 2 and 3, R. 57, 58 are the syllabus as printed in 42 B. T. A. Reports 225.]

Order of the United States Circuit Court of Appeals for the Sixth Circuit, Record following page 91, reported 127 F. (2d) 523. [That court rendered no opinion.]

II.

Jurisdiction.

1. The date of the judgment to be reviewed is April 7th, 1942 (Record following p. 91).

2. The statutory provision, which is believed to sustain the jurisdiction of this Court, is sub-section (a) of Section 240 of the Judicial Code as amended by 36 Stat. 1157; 43 Stat. 938; 45 Stat. 54; 48 Stat. 926 (28 U. S. C. A. § 347) reading, so far as applies to this case, as follows:

> "In any case, civil or criminal, in a Circuit Court of Appeals * * *, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by

it with the same power and authority and with like effect, as if the cause had been brought there by unrestricted appeal."

3. This is a civil case in the United States Circuit Court of Appeals for the Sixth Circuit (see proceeding in that court in the record following p. 91). This petitioner is a party thereto (see petition for review, R. 71); and this petition is filed after judgment by the lower court and within three months after that judgment (R. following p. 91, and 28 U. S. C. A. § 350 as amended by 45 Stat. 54; 48 Stat. 926).

III.

Statement of the Case.

The case has already been stated in Section I of the preceding petition (ante pp. 1 to 7) which is hereby adopted and made a part of this brief.

IV.

Specifications of Error.

1. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the trustee under the trust instrument in this case (R. 37) in the exercise of his power as trustee to distribute income and corpus of the trust to petitioner and her children had no substantial interest adverse to the settlor, the petitioner herein.

2. Said Court of Appeals erred in not holding that the duty of the trustee under said trust instrument, in exercising his discretion in distributing income and corpus of the trust, to conserve the income and corpus of the trust to the end that the children may fully enjoy the benefits which it is the purpose of the trust to confer upon them, made

the trustee a person having a substantial interest adverse to the settlor within the meaning of Sections 166 and 167 of the Revenue Act of 1934.

V.

Argument.

The argument, summarily stated, is that the trustee, in the exercise of his discretion to make distribution of income and corpus of the trust to the settlor as a beneficiary, owed a duty to the children, the other beneficiaries, to limit the distributions to the settlor, not only to such payments to the settlor as are specified by the terms of the trust, but also to such payments as would leave funds sufficient to satisfy all the rights and interests of the children in the income and corpus which it is the intent of the trust instrument to confer upon them; that a failure by the trustee to perform this duty made him pecuniarily liable to the children; that this liability, equity would enforce against him at the instance of the children, and that therefore the trustee is interested adversely to the settlor in respect of any distribution he made to her.

The smaller the payments by the trustee to Mrs. Wenger during the continuance of the trust, the greater the amount that each child will receive at the termination of the trust, and it is the duty of the trustee to exercise a sound and reasonable judgment in protecting this interest of the children.

The trust was for the benefit of the children as well as the settlor.

A purpose of the trust is declared in Section B of the instrument to be for "alleviating the wants and needs of herself and children" (R. 38); a reason for creating the trust stated in Section C. 1 (R. 38) is the situation of the settlor and the children. The reason stated in Section

C. 2 (R. 38, 39) is the nature of the provisions of Emil P. Wenger's will, which affects the children alone and not the settlor. By Section G (1) (R. 42) if certain things happen to "the maker hereof and/or any of her children, or their descendants," the trustee may [the word "may" gives authority or permission merely] distribute to such beneficiary or beneficiaries "sums" which in the discretion of the trustee will be sufficient for certain purposes (R. 42). By Section G (2) (R. 42, 43), if certain things happen to the children, or any of them (which can happen to the children only and not to the settlor) the trustee "shall [This is an imperative command to the trustee.] pay to any such beneficiary [This term here means one or more of the children and not the settlor.] such sum or sums of money necessary to enable such beneficiary or beneficiaries to recoup" certain specified losses. [These terms do not give the trustee any discretion as to the amounts he shall pay for the benefit of the children; the whole loss is to be made good (R. 42, 43).]

These provisions of the trust instrument are followed by a paragraph (R. 43) granting the trustee "right, power and authority of encroaching upon the principal of the trust" on condition, however, that the income is not sufficient for the purposes contemplated by these provisions, "and the gravity of the situation demands that the aid be furnished" (R. 43).

Section G (3) provides that if the income during any year is such "that in the judgment of said trustee it would be advisable to make a distribution of part or all of such surplus income" the trustee is authorized to make distribution of all or part thereof (R. 43).

Upon the termination of the trust, distribution of the trust funds is to be made by the trustee as provided in Section H (R. 43). In making it, the trustee will have many questions of value to decide between Mrs. Wenger

and the children. The less the payments to Mrs. Wenger during the continuance of the trust, the more there will be to distribute to each child at its termination. It is the duty of the trustee to conserve this interest; in favoring Mrs. Wenger he must not sacrifice the children or their descendants.

We submit, therefore, that the trust instrument imposes substantial duties on the trustee to protect and conserve interests of the children as opposed to interests of the settlor, and that this fact makes him a person endowed with a substantial interest adverse to the settlor.

Where broad powers are conferred upon a trustee to be exercised in his discretion, a court of equity has power to control the administration of the trust to the end that the purposes for which the trust was created may be attained. In *Stuart* v. *Commissioner,* 124 F. 2d 772, at p. 777, the Circuit Court of Appeals of the 7th Circuit said:

> "A court of equity has power to control the administration of a trust so that it will accord with the purposes of the grantor. A discretion lodged in a trustee is rarely, if ever, to be regarded as a permit to act arbitrarily. Such discretion should be confined to the exercise of judgment not unreasonable in the light of the purposes of the trust and of the circumstances in which it is sought to be exercised. The power of the court exists solely for the protection of the right of the grantor and the beneficiaries (see Rollins *v.* Helvering [92 F. 2d 390])."

Under this doctrine it was held in that case, where the settlor, his wife, and his brother were the three trustees, and the trust instrument provided that the wife and brother, or the survivor of them, should have the power to change the beneficiaries or change the trust indenture in any other respect, that, nevertheless, the wife and brother had no authority to revest the property either in

themselves or the grantor on the ground that this would "give them power, not only to destroy the trust but to dissipate the proceeds contrary to the purposes set forth in the declaration, and it would also furnish an opportunity by secret agreement for subsequent distribution among the trustees. Such a door should not be left open. Congress and the courts, theoretically at least, have always regarded the preservation of trust funds as a sacred obligation, and they have always and everywhere proceeded on the theory that a trust officer should not be permitted to be placed in any position where he may be 'tempted above that which he is able'."

In 65 Corpus Juris, page 648, it is said that a trustee's duties require that he represent and protect the interests of all the beneficiaries impartially, and that he act honestly and with the utmost good faith.

In *Lovett* v. *Farnham*, 169 Mass. 1, the syllabus reads in part:

> "The amount spent by the trustee under a discretionary power of what is needed, must be founded on a reasonable judgment, dealing with existing facts, and having a due regard for the purposes for which the power was given, and also for the rights of those whose interests are injuriously affected by its exercise."

It has been held that if the power is given to use trust funds in case of need to support the beneficiary, it can only be used upon the happening of such a necessity, and cannot be used to supply the beneficiary with money in invest or to draw out all the trust funds and so terminate the trust. In the matter of Wentworth, 230 N. Y. 176.

The discretion vested in a trustee is subject to the control of a court of chancery.

Maguire v. *City of Macomb*, 293 Ill. 441;
Welch v. *Caldwell*, 226 Ill. 488;
Jones v. *Jones*, 124 Ill. 254;

Frank v. *Frank*, 305 Ill. 181;
Restatement of Law of Trusts, Sec. 170;
Wales v. *Gray*, 109 Mich. 346;
Scott on Trusts, Vol. 2, Sec. 187;
Gibney v. *Allen*, 156 Mich. 301 at p. 312;
65 Corpus Juris, pp. 647, 648, Sec. 519;
In re Thompson's Estate, 262 Pa. 278;
Patterson v. *Old Dominion Trust Co.*, 139 Va. 246;
In re Fox's Estate, 264 Pa. 478;
Holian v. *Holian*, 265 Mass. 563;
Congdon v. *Congdon*, 160 Minn. 343.

In *Corning* v. *Commissioner* (C. C. A. 6), 104 F. 2d 329, it was held that right in a beneficiary to receive current income made the beneficiary one having an adverse interest. We submit that it follows from this that a trustee, whose duty it is to protect the right of a beneficiary to receive income or corpus, must also have an adverse interest.

In *Phebe Warren McKean Downs* v. *Commissioner*, 36 B. T. A. 1129, at p. 1134, it was said that a trust instrument is always construed against the grantor and in favor of the beneficiaries. In the instant case that would be against the settlor and in favor of the children.

The only decision of the court cited below to the point that the trustee is without adverse interest is *Reinecke* v. *Smith*, 289 U. S. 172; the Court of Appeals cites that case and *Altmaier* v. *Commissioner*, 116 F. 2d 162, 164.

Reinecke v. *Smith* does not decide that a trustee cannot be adversely interested; indeed the implication from the ground of the decision is that he might be. The case arose under Section 219 (g) of the Revenue Act of 1924 (Act of June 2, 1924, C. 234, 43 Stat. 253-355) the words of which pertinent here are:

> "Where the grantor of a trust has, * * * either alone or in conjunction with any person not a bene-

> ficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust * * * shall be included in computing the net income of the grantor."

The trust instrument there involved provided for its modification or revocation by an instrument in writing signed by the settlor (who was one of three trustees) and either one of two other trustees. The court said that a trustee is not a beneficiary, and also said:

> "The trustee is not a trustee of the power of revocation and owes no duty to the bneficiary to resist alteration or revocation of the trust. Of course he owes a duty to the beneficiary to protect the trust *res*, faithfully to administer it, and to distribute the income; but the very fact that he participates in the right of alteration or revocation negatives any fiduciary duty to the beneficiary to refrain from exercising the power."

This then is a decision that the power to revoke lodged in a person who at the same time may be a trustee is not a fiduciary power; its exercise is not part of the administration of the trust; but it also is an assertion that the trustee does owe duties to the beneficiaries in the administration of the trust. The trustee in the instant case has no power to revoke, nor has the settlor; the trustee has powers and duties of management and distribution in the exercise of which equity will require him to deal justly with due regard to the conflicting interests of the several beneficiaries and to the achievement of all the purposes of the trust.

The trust instrument in *Altmaier* v. *Commissioner* (C. C. A. 6), 116 F. 2d 162, is, we submit, so radically different in its terms and purposes from the trust instrument now in question that it should not be held a precedent for the instant case. There the trust could be destroyed under the unequivocal terms of the trust instrument—here the purpose of the continuance of the trust for a long term, and

the intention to confer substantial beneficial interests on the children, which it is the duty of the trustee to protect, is plain; under the decision in *Stuart* v. *Commissioner*, 124 F. 2d 772 in the 7th Circuit, equity will not permit the trustee to act so as to destroy the trust; if *Altmaier* v. *Commissioner* holds otherwise, we have a conflict of decision between the Courts of Appeal of the 6th and 7th Circuits.

That the principles of equity jurisprudence as applied to the law of trusts prevail in the Federal as well as State jurisdictions is sanctioned by this Court.

Freuler v. *Helvering*, 291 U. S. 35;
Blair v. *Commissioner*, 300 U. S. 5;
Morgan v. *Commissioner*, 309 U. S. 78;
Stuart v. *Commissioner* (C. C. A. 7) 124 F. 2d 772.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari, and thereafter reviewing said decision.

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